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No. 91-1322

IN THE

Supreme Court of the United States

October Term, 1991

RICHARD J. BRIGNOLI,

Petitioner,

v.

BATTLE FOWLER, as Receiver and Liquidating Trustee of Brignoli, Curley & Roberts Associates,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

the Court of Appeals for the Second Circuit, in
decision of the District Court awarding partial
dgment to a receiver and liquidating trustee of a
nership on claims which involved no issues of fact
held the receiver's standing to bring these claims
lement to judgment on these claims without trial to
these issues had effectively been determined by the
uit on the appeal from the final judgment in the
ich the receiver was appointed, further review of
denied by this Court by its denial of petitioner's
a writ of certiorari in that action.

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No. 91 - 1322

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v.

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Preliminary Statement

Respondent Battle Fowler, as receiver and liquidating trustee (the "Receiver") of Brignoli, Curley & Roberts Associates ("BCR"), respectfully submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit ("Second Circuit") filed by petitioner Richard J. Brignoli ("Brignoli"). The Receiver submits that the issues raised in the petition have already been determined by the Second Circuit's decision in *Curley* v. *Brignoli Curley & Roberts Associates*, 915 F.2d 81 (the "*Curley* Action"), further review of which was denied by this Court (*cert. denied*, 111 S.Ct. 1430, 113 L.Ed.2d 484), and that there are

no other "special and important reasons" presented for the granting of the petition at this time in this subsequent action brought by the Receiver (the "Receiver's Action").

B. The Parties and Background Events

The Receiver was appointed to undertake the dissolution and liquidation of BCR and to pursue claims on BCR's behalf against petitioner and others following the District Court's decision in the *Curley* Action. The Receiver's Action against Brignoli and others was based upon the record evidence and the findings made by the District Court in the *Curley* Action and after a full review of BCR's books and records.

The *Curley* Action was commenced in the District Court for the Southern District of New York on July 29, 1988. The plaintiffs in the *Curley* Action were John J. Curley ("Curley"), a citizen of New Jersey; James Karanfilian ("Karanfilian"), also a citizen of New Jersey; and Duane Roberts ("Roberts"), a citizen of Connecticut. The defendants were BCR, a Delaware limited partnership which had a principal place of business in New York; Brignoli & Curley, Inc. ("BCI"), a Delaware corporation which also had a principal place of business in New York; and Brignoli, who claimed to be a citizen of Connecticut while plaintiffs claimed that he was a citizen of New York. The basis for federal jurisdiction was diversity of citizenship.[1]

BCR was formed to engage in the business of managing equity portfolios for institutional investors. BCI is the sole general partner of BCR. Brignoli was the controlling shareholder of BCI. Curley was the chief executive officer of BCI until he was ousted by Brignoli in December 1987.

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[1] Roberts was dismissed as a party plaintiff by the District Court pursuant to Fed.R.Civ.P. 21 to preclude any challenge to diversity jurisdiction based upon Roberts' Connecticut citizenship and Brignoli's claimed Connecticut citizenship.

Curley, Karanfilian and Roberts are limited partners of BCR. Karanfilian served as an investment officer of BCR and Roberts was the director of marketing for BCR. Brignoli Models, Inc. ("BMI"), a Delaware corporation, is also a BCR limited partner. Brignoli is the chairman and the chief executive officer and majority stock owner of BMI. BMI licensed to BCR a stock trading program which produced a daily trade blotter for BCR listing the names and amounts of securities to be bought and sold within so-called "limit" prices. Curley, Karanfilian and Roberts collectively own approximately 36% of the equity of BCR and BMI owns approximately 54%. The balance of the equity of BCR is owned by other limited partners of BCR.

C. The Curley Action

The *Curley* Action complaint alleged breaches of fiduciary duty by BCI as the general partner of BCR and by Brignoli as the person in control of BCI. Among other things, plaintiffs claimed that: (1) Brignoli and BCI refused to provide plaintiffs with access to BCR's books and records; (2) Brignoli used a BCR certificate of deposit (the "CD") in the amount of $175,000 to secure a bank loan to BMI; (3) Brignoli authorized BCR to make excessive payments to BMI for trading auditing services; and (4) from the time that he assumed full control of BCR in December 1987, Brignoli had operated the business in a manner that benefitted himself and his entities to BCR's detriment. The relief sought included: (1) removal of BCI as general partner of BCR or, in the alternative, the dissolution of BCR; (2) judgment against Brignoli and BCI in favor of BCR for damages based upon the breaches of fiduciary duty alleged; and (3) an accounting as to BCR.

Defendants asserted several affirmative defenses which among other things alleged that payments made to BMI to audit trading results were necessary and reasonable and that plaintiffs had unclean hands by virtue of purported violations of ERISA and securities laws and other alleged misconduct. In addition,

defendants brought a third party action against BCR's former broker, Brick Securities ("Brick") and Richard Bennett ("Bennett"), a principal of Brick, for breach of contract, breach of fiduciary duty and negligence based upon Brick's purported failure to execute trades in accordance with the daily trade blotter. Defendants mixed these third party claims with overlapping counterclaims against plaintiffs who were charged with a purported failure to supervise Brick and acting in concert with Brick and Bennett to breach fiduciary duties.[2]

The District Court determined to hear the *Curley* Action by first having the third party action against Brick and Bennett tried before a jury and then having the dissolution and accounting claims tried non-jury with the use of the record developed on the jury trial. The jury returned a verdict of non-liability against Brick and Bennett. 746 F. Supp. at 1210.

D. Findings Made by the District Court in the Curley Action

Following the bench trial, the District Court found that Brignoli, upon assuming control of BCI, had been guilty of, and had caused BCI to be guilty of, "such crass and autocratic conduct in the service of his selfish interest and in derogation of the interests of the limited partnership so as to affect prejudicially the carrying on of the business of the partnership". 746 F. Supp. at 1210-11. This conduct warranted the removal of the general partner and the appointment of a receiver until the limited partners could determine whether the business should be continued under a trusteeship or whether the business should be dissolved with the appropriate accounting. *Id.* at 1211. The Court found that the evidence adduced at trial amply established "glaring misconduct" by Brignoli and BCI. *Id.* The limited partners had been denied access to the

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[2] A more complete description of the claims, counterclaims and defenses asserted in the *Curley* Action appears at 746 F. Supp. 1213-14.

partnership books and records and the assets of BCR had been "grossly misused" by BCI and Brignoli. *Id.* The District Court specifically found that Brignoli had misappropriated the CD and that Brignoli's testimony with respect to the CD was a "patent attempted cover-up for a fraudulent act on his part". *Id.* at 1215. In addition, the District Court found that Brignoli had: (1) caused BCR to make excessive payments to BMI for so-called "trading audit services" or "trading cost analyses"; (2) "abused his position with BCR by replacing Brick with [another entity] as part of a larger plan to 'freeze out' the plaintiffs from a business they started, built from scratch and from which they had only begun to receive substantial benefit"; (3) "misappropriate[d] BCR's marketing resources for the benefit of his other company, Brignoli Advisors"; (4) "caused BCR to hire BMI employees at inflated rates to perform routine back office work for BCR"; (5) placed himself on the BCR payroll at a salary of $250,000 per year while still receiving a $175,000 salary for a second full-time position at BMI although the testimony showed that Brignoli "was largely ignorant of [BCR's] day to day operations"; and (6) directed BCR to pay "a whole host of BMI employees and consultants for work performed for BMI". *Id.* at 1216-18. The Court concluded:

> When viewed in concert these acts provide mounting evidence of the degree of abuse and self-dealing in conducting BCR's affairs that Brignoli imparted during his tenure at BCI. This limited partnership whose continued existence depended on the good faith and fair dealing of the General Partner, has furnished the Court every reason for terminating the General Partner's tenure.

Id. at 1218-19.

Based upon the jury's verdict in the Brick third party action the District Court rejected Brignoli's defense that BCR's payments to BMI were necessary and reasonable. *Id.* at 1220.

The District Court also applied the Brick jury verdict to dispose of those counterclaims against the plaintiffs which were based on Brick's purported failure to execute trades. *Id.* at 1220-21. Brignoli's other defenses including the unclean hands defense were also rejected. *Id.* at 1219-21.

E. Subsequent Proceedings

Pursuant to the District Court's decision, the BCR limited partners (other than BMI, which Brignoli controlled) voted to dissolve BCR. The judgment entered on the Court's decision provided for the dissolution of BCR and the appointment of the Receiver to wind up the affairs of the partnership.[3] The Receiver proceeded to take the necessary steps to liquidate and dissolve BCR. Among other things, the Receiver terminated BCR's business operations, collected its receivables and sold its furnishings and equipment.

After reviewing the record in the *Curley* Action and the books and records of BCR, the Receiver recommended to the District Court: (1) that an appeal of the jury verdict by BCR was not warranted; (2) that any remaining counterclaims against plaintiffs to the extent they were not barred by the jury verdict not be pursued; and (3) that BCR pursue certain specific claims for damages against Brignoli, BMI and Brignoli's attorney, Arie David. The Court directed that the Receiver pursue certain of the claims recommended and the Receiver brought the Receiver's Action in December 1989.

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[3] The judgment also directed Brignoli to immediately restore the CD to BCR free and clear of any liens, claims or encumbrances and, if Brignoli failed to do so, judgment was to be entered against him in the amount necessary to release the CD. Brignoli failed to make such restitution to BCR and a separate judgment was entered against him for the amount of the CD. This judgment along with the judgment for dissolution was appealed by Brignoli to the Second Circuit in the *Curley* Action.

F. The Curley Action Appeal

The District Court's findings on the merits and the relief awarded, including a money judgment against Brignoli for the amount of the misappropriated CD, were fully endorsed by the Second Circuit. The District Court's decision was affirmed notwithstanding the Supreme Court's recent decision in *Carden v. Arkoma Associates*, 494 U.S. 185, 110 Sup. Ct. 1015, 108 L.Ed. 2d 157 (1990), which had been decided while the *Curley* Appeal was pending and which had called into question the diversity jurisdiction of the District Court. *Carden* held that in a suit brought by a limited partnership against two parties on a contract dispute, the citizenship of each of the limited partners of the limited partnership must be taken into account to determine diversity of citizenship between the partnership and the other parties. Until *Carden*, under the long-standing rule in the Second Circuit, diversity jurisdiction in actions involving limited partnerships existed as long as identity of citizenship did not exist between the general partners of the limited partnership on one side of the case and the named parties on the other side of the case. *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966). Under *Colonial*, diversity of citizenship existed between Curley and Karanfilian as citizens of New Jersey and the defendants (including BCR) who were either citizens of New York, Delaware or Connecticut. Under *Carden*, diversity jurisdiction would be destroyed because the New Jersey citizenship of Curley and Karanfilian would be present on both sides of the case with the limited partnership, BCR, as a defendant.

Nevertheless, the Second Circuit properly recognized that it had an obligation to explore any promising avenue which would sustain jurisdiction whether or not it was pleaded. 915 F.2d at 85. In so doing, the Court determined that under New York law, in lieu of a derivative action, a class action on behalf of the limited partners could have been brought against BCI and Brignoli to redress the general partner's breaches of fiduciary

duty without naming BCR as a party. *Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528, 223 N.E.2d 869, 277 N.Y.S.2d 377 (1966).[4] The Court further determined that this class action against BCI and Brignoli was maintainable under Fed.R.Civ.P. 23.2 and the sole prerequisite for class treatment under this rule, fair and adequate representation, had been met. 915 F.2d at 85. Finding the gravamen of the complaint to be the looting of BCR for Brignoli's benefit and finding the proof of that improper conduct to be amply supported by the trial record, the Court recognized that the named plaintiffs had proved themselves capable of fairly and adequately representing the identical interests of the limited partners (excluding BMI which had participated in Brignoli's wrongdoing) in terminating Brignoli's improper course of conduct and obtaining compensation from the wrongdoers. *Id.* Under 28 U.S.C. § 1653 (1988), the Second Circuit recharacterized the action as a class claim and found that BCR could be dropped as a dispensable party under Fed.R.Civ.P. 19 thereby maintaining diversity of citizenship and subject matter jurisdiction.

The Second Circuit denied petitioner's petition for rehearing of the *Curley* Action on November 6, 1990 and this Court denied petitioner's petition for a writ of certiorari on April 1, 1991. Petitioner's arguments that the holding in *Carden* deprived the District Court of jurisdiction were rejected and should again be rejected here.

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[4] Contrary to petitioner's claim, *Lichtyger* fully supports the Second Circuit's view that under New York law a representative action will lie where there is an alleged breach of a general partner's fiduciary duty to the limited partners. In addition, under New York law, a limited partner can sue in his own behalf for dissolution and/or for an accounting. See New York Partnership Law §§ 63, 99 (McKinney's 1988).

G. The Receiver's Action

Following the Second Circuit's affirmance of the District Court's findings in the *Curley* Action and its affirmance of the jurisdictional basis for the Receiver's actions, the Receiver moved forward with the Receiver's Action. The Receiver's Action asserted the following four claims for relief: (1) that by reason of Brignoli's breaches of fiduciary duty, Brignoli must return all salary paid to him by BCR while he was in breach of his fiduciary duty (first claim); (2) that by reason of Brignoli's breaches of fiduciary duty, Brignoli must account for BCR's payments of legal fees and disbursements for Brignoli's benefit in connection with the *Curley* Action (second claim); (3) that BCR was entitled to recover certain retainer payments made to attorney Arie E. David for which no work was performed (third claim); and (4) that Brignoli and BMI must return the overpayments made by BCR to BMI for trading audit services (fourth claim).

H. The Summary Judgment Motion

On February 4, 1991 the Receiver moved for summary judgment pursuant to Fed.R.Civ.P. 56(a) on the first and second claims brought against Brignoli and on the fourth claim brought against Brignoli and BMI based upon the *Curley* Action findings. Relying upon the Second Circuit's decision in the *Curley* Action, the District Court upheld the Receiver's standing to pursue the claims alleged on behalf of BCR, and proceeded to grant summary judgment on the first and second claims against Brignoli and deny summary judgment to the Receiver on the fourth claim against Brignoli and BMI. As to the first claim, the District Court concluded that all of Brignoli's dealings with BCR from late 1987 through August 1989 had been tainted by reason of the extreme level of gross misconduct committed by Brignoli as found in the *Curley* Action. Thus, the return of all compensation paid after Brignoli put himself on the BCR payroll was required. As to the second claim, the District Court

concluded that Brignoli's gross misconduct as found in *Curley* Action precluded him from obtaining indemnity for legal fees under the BCR partnership agreement. The amounts of the salary paid to Brignoli and the legal fees and costs incurred were based upon BCR's books and records and presented no issues of fact. Thus, summary judgment was properly entered on these claims.[5]

On November 15, 1991, the Second Circuit affirmed for substantially the reasons set forth by the District Court in its opinion and decision filed June 18, 1991.

ARGUMENT

I. NO NEW STANDARD OF DIVERSITY JURISDICTION WAS CREATED BY THE SECOND CIRCUIT IN THE *CURLEY* ACTION

Petitioner's contention that the Second Circuit created an exception to federal diversity jurisdiction requirements in the *Curley* Action not shared by other circuits, which he claims will cause many other partnership derivative actions to flow through the New York federal courts rather than state courts, is unfounded. This purported ground for granting review was rejected by this Court's denial of the petition for writ of certiorari in the *Curley* Action and should again be rejected here.

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[5] Because the Receivership's funds are limited, the Receiver has determined that these funds would be better utilized in pursuing the judgments against Brignoli than in pursuing the remaining claims in this action which would require significant legal expense. Accordingly, on the Receiver's motion, the District Court dismissed the remaining claims in the Receiver's Action without prejudice.

In recharacterizing the *Curley* Action as a class action the Second Circuit did not expand federal diversity jurisdiction but merely looked to Fed.R.Civ.P. 23.2 to preserve diversity jurisdiction to achieve a just and fair result in the particular circumstances of that case. In utilizing Rule 23.2 the Second Circuit was well aware that some courts had adopted a more restrictive reading of the rule which would preclude its use if the state in which the district court sits allows an unincorporated association the requisite capacity to be a party to the suit. 915 F.2d at 86. This narrow interpretation of the rule stems from an advisory committee comment to Rule 23.2 which states that the real or main purpose of this rule has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Fed.R.Civ.P. 17(b) which determines capacity to sue or be sued based upon the law of the state in which the district court is held. These courts, including the First Circuit's decision in *Northbrook Excess & Surplus v. Medical Malpractice Joint Underwriting Association of Massachusetts*, 900 F.2d 476, 478-79 (1st Cir. 1990), view the committee note as an instruction to limit the use of the rule to provide capacity for unincorporated associations where none exists under state law. Under this reasoning, because New York procedural law gives a partnership the capacity to sue or be sued as an entity, Rule 23.2 would be unavailable to the BCR limited partners.

The Second Circuit, however, disagreed with *Northbrook* and the more restrictive interpretation of Rule 23.2. It agreed with other courts and the commentators which have supported the view that Rule 23.2 is a procedural device which provides a supplementary method for unincorporated associations to litigate in a federal court irrespective of state capacity laws. *See, e.g., Kerney v. Fort Griffin Fandangle Ass'n, Inc.* 624 F.2d 717, 719-20 (5th Cir. 1980); *Lefebvre v. Kelly*, No. 83 Civ. 3211 (ERK), 1987 WL 12036 (E.D.N.Y. May 21, 1987); *Lumberman's Underwriting Alliance v. Mobil Oil Corp.*, 612 F. Supp. 1166, 1170 (D. Idaho 1985); *see* also 7C C. Wright, A.

Miller & M. Kane, *Federal Practice and Procedure* § 1861, at 223 (2d ed. 1986). (In *Lefebvre*, Rule 23.2 was specifically found to be applicable in a dispute brought by a class of members of an unincorporated association against other individual members of the association charged with wrongdoing.) The Second Circuit observed that the drafters of the rule, having found it necessary to grant advantageous procedures in states which restrict association capacity, would make those same procedures available in all district courts, and if they intended the anomaly that the availability of class actions would turn on state capacity laws, the drafters could have so provided in the text of the rule. 915 F.2d at 87.

As the Receiver urged in opposing the petition for writ of certiorari in the *Curley* Action, regardless of any disagreement that may exist concerning the scope of Rule 23.2, the *Curley* Action was not the appropriate case for review of this issue by this Court. Although petitioner complains that much of what the Second Circuit did was influenced by the merits, the merits of the *Curley* Action cannot be so readily ignored given petitioner's gross misconduct, the damage inflicted to BCR and the many actions subsequently undertaken by the Receiver pursuant to its appointment as liquidating trustee of BCR. In the District Court the limited partners proved that Brignoli and BCR had committed egregious breaches of fiduciary duty in pursuit of their own self-interests to the detriment of the partnership and the limited partners interests therein. Given the "extreme level of gross misconduct and arbitrary management of BCI's affairs willfully committed by Brignoli" the District Court found that it was not reasonably practicable to carry on the business of BCR with BCI as general partner. 746 F. Supp. at 1221. The inability of the general partner to perform its duties fairly and in good faith warranted the appointment of the Receiver who has proceeded to dissolve BCR pursuant to the vote of the limited partners. As a consequence, BCR ceased doing business as of September 30, 1989 and it no longer has any office, clients or employees.

Over a period of more than two years, the Receiver has taken a number of other actions consistent with the orderly liquidation of BCR and winding up of its affairs including the institution of the Receiver's Action. Petitioner never sought to stay the Receiver's actions in the *Curley* Action, and the Receiver's actions undertaken thus far pursuant to the fully litigated judgments entered in the District Court cannot be unraveled at this stage. Because the relief afforded by the District Court has to a large extent already been implemented by the Receiver, review at this late date by this Court of the procedural issues already decided in the *Curley* Action, would be of little or no value here. The application of Rule 23.2 to recharacterize this proceeding as a class action instead of a derivative action is consistent with the holding in *Carden*,[6] achieved a fair and just result, worked no procedural disadvantage or prejudice to petitioner and has allowed the Receiver to complete its duties in the best interests of the partnership.

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[6] Petitioner's comment that District Court judges in New York are "troubled" by the *Curley* decision is disingenuous. In *Shlomchick v. Richmond 103 Equities Co.*, 763 F. Supp. 732 (S.D.N.Y. 1991), cited by petitioner, the District Court noted that *Curley* suggests a novel, but *viable*, solution to maintaining diversity where a class action could have been brought under Fed.R.Civ.P. 23.2 and the partnership can be dismissed as a dispensable party defendant. 763 F. Supp. at 739. Because pendent jurisdiction existed in *Shlomchick* there was no need for the court to recharacterize the action as a class action. *Id.* at 740. Similarly, in *900 3rd Avenue Associates v. Finkielstein*, 758 F. Supp. 928 (S.D.N.Y. 1991), also cited by petitioner, the District Court did not view *Curley* as a "license" to subvert *Carden*. Rather, it held that a class action could not be brought under the circumstances of that case and further noted that unlike the case before it, in *Curley*, the Second Circuit was concerned that a dismissal after the matter had proceeded to trial and judgment would result in a windfall escape from judgment and a waste of time and expense. 758 F. Supp. at 932. See also *Haggerty v. Comstock Gold Company*, 770 F. Supp. 216 (S.D.N.Y. 1991) (defunct partnership dropped as a dispensable party to preserve diversity jurisdiction over state law claims).

II. THE SECOND CIRCUIT FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUE OF BCR AS AN INDISPENSABLE PARTY UNDER RULE 19(b) IN THE *CURLEY* ACTION

Petitioner's challenge to the Receiver's standing in the Receiver's Action is based upon the same grounds which petitioner advanced for review of the indispensable party issue in the *Curley* Action. These arguments were rejected by the Second Circuit on the petition for rehearing and again by this Court on the petition for writ of certiorari. The Second Circuit properly dismissed BCR as a party in the particular circumstances of the *Curley* Action pursuant to *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989), which held that an appellate court should carefully consider whether the dismissal of a non-diverse party will prejudice any of the parties in the litigation. 490 U.S. at 838; 109 Sup. Ct. at 2226. The Second Circuit correctly determined that dismissal of BCR was particularly appropriate because it spared plaintiffs the prejudice otherwise occasioned by an unforeseeable change in the law invalidating a long-standing jurisdictional precedent without impacting in any adverse manner upon defendants. 915 F.2d at 89.

Relying upon the teaching of *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968), and applying the criteria of Rule 19(b) to the facts of this case, in the *Curley* Action the Second Circuit properly determined that BCR should be dismissed as a party to preserve diversity of citizenship. As the Second Circuit stated, *Provident Tradesmens* makes clear that at the appellate stage of a litigation, successful plaintiffs' "interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage when the plaintiffs' only concern was for a federal

rather than a state forum," *id.* at 112, 88 S.Ct. at 739; that the issue of whether a person is indispensable in a particular lawsuit "can only be determined in the context of a particular litigation," *id.* at 118, 88 S.Ct. at 742; and that close attention should be paid to "the significant pragmatic considerations involved in the particular circumstances leading to a resolution consistent with practical and creative justice," *id.* at 119 n.16, 885 S.Ct. at 743 n.16. These considerations applied to the four factors set forth in Rule 19(b) supported the Second Circuit's determination "in equity and good conscience" that the action should proceed among the partners notwithstanding BCR's absence. It specifically found in accordance with Rule 19(b) that

> "(1) a judgment rendered in BCR's absence will not be prejudicial to BCR or to any of its limited or general partners; (2) the district court can, by shaping the future relief in this action, address and alleviate any anomalies or inconsistencies that would otherwise result from the absence of BCR as a party, especially since all the limited partners (through the class representatives) and the general partner of BCR will be before the district court; (3) again because of the presence of the limited and general partners of BCR, a judgment rendered in its absence will be adequate; and, (4) plaintiffs will not have an adequate remedy if their action is dismissed for nonjoinder, since they would then have to commence a new action in state court, foregoing the relief to which they are justly entitled after the proceeding herein in the district court, and risking further transgressions by Brignoli and BCI during the course of the new litigation."

915 F.2d at 90-91.

The Second Circuit relied upon ample precedent supporting the proposition that a partnership is not an indispensable party

where the partners are before the Court. *VMS/PCA Ltd. Partnership v. PCA Partners Ltd. Partnership*, 727 F.Supp. 1167, 1169-71 (N.D. Ill. 1989); *Godine & Stunda, Inc. v. Reading Station Assocs. Ltd. Partnership*, No. Civ. 89-0514, 1989 WL 49214 (E.D.Pa. May 4, 1989); *Whitney v. Citibank, N.A.*, No. 81 Civ. 5832 (CBM), 1985 WL 566 (S.D.N.Y. Apr. 19, 1985). The circumstances of *Whitney* are closely analogous to the *Curley* Action as the Rule 19(b) issue arose after trial. The *Whitney* Court noted that "there would be great prejudice to [plaintiff] to force him to relitigate this complex case at great expense, particularly when the court has already found that his rights were wilfully violated by defendants," slip. op. at 11-12, and concluded that "[t]o dismiss the present action because a dissolved partnership, which holds no meaningful assets and whose partners are all before the court, cannot be joined as a party would be to exalt form over substance and frustrate the intent of Rule 19," *Id.* at 12.[7]

As the Second Circuit noted, BCI and Brignoli should not be provided with a "windfall escape" from their defeat at trial with the time and expense of a trial already spent. 915 F.2d at 91, citing *Provident Tradesmens*, 390 U.S. at 112, 88 S.Ct. at 739. The Receiver has already taken and will continue to take all appropriate steps to conclude the dissolution of BCR and render a final accounting with the interests of all partners being represented while the District Court can effectively deal with any difficulties that may arise in the absence of BCR as a named party in the *Curley* Action by appropriate orders to achieve the necessary results in the best interests of the partnership and its members. Petitioner has not identified any difficulties presented in these circumstances relating to the Receiver's Action or otherwise that could not be readily dealt

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[7] In contrast, *Buckley v. Control Data Corporation*, 923 F.2d 96 (8th Cir. 1991), relied upon by petitioner, and which found a partnership to be an indispensable party for claims found to be derivative under Minnesota law, was decided at the outset of the litigation.

with by the District Court. It is clear that he wishes a reversal of the judgment entered against him in the Receiver's Action to serve his own self interests -- and not the best interests of BCR.

III. PETITIONER WAS NOT DENIED ANY RIGHT TO A TRIAL BY JURY IN THE RECEIVER'S ACTION

Petitioner contends that his purported right to a trial by jury did not fully present itself until after this Court's denial of the petition for writ of certiorari in the *Curley* Action, when the District Court entered summary judgment for money damages against him in the Receiver's Action. However, petitioner had every opportunity to appeal any claimed denial of a right to a jury trial in the *Curley* Action and in fact did so. In the *Curley* Action, a separate money judgment in the sum of $175,000 was entered against petitioner for his misappropriation of the BCR CD. On the appeal in the *Curley* Action, Brignoli claimed that he was denied a right to a jury trial with respect to this money judgment. That claim was rejected.

Petitioner's argument that *Ross v. Bernhard*, 396 U.S. 531, 90 S. Ct. 733, 24 L.Ed.2d 729 (1970) and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 795 Sup. Ct. 948, 3 L.Ed.2d 988 (1959) mandated a jury trial of the claims brought by the Receiver confuses the *Curley* Action with the Receiver's Action. The Receiver's Action is a plenary action which alleged four specific claims each for specific amounts of damages based upon the findings made in the *Curley* Action and on the Receiver's review of BCR's books and records. No issue exists in the Receiver's Action as to whether legal claims should have been tried first to a jury before equitable claims. To the extent that any such issue could exist, it could have existed only in the *Curley* Action and petitioner had every opportunity to raise this issue in that action and in fact did so. The Second Circuit having denied petitioner's petition for rehearing and this Court having denied petitioner's petition for writ of certiorari in the

Curley Action, no further review of this issue is required or necessary in the Receiver's Action.

Moreover, as petitioner himself conceded in the District Court, the determination of the facts underlying Brignoli's breach of fiduciary duty in the non-jury *Curley* Action proceeding does not preclude offensive use of these findings in the subsequent Receiver's Action irrespective of a jury trial demand made therein. See *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). In *Parklane*, this Court gave broad discretion to trial courts to determine when offensive use of collateral estoppel was appropriate. 439 U.S. at 331. Brignoli had a full and fair opportunity to be heard on all of the fiduciary breach claims determined in the *Curley* Action and there is no unfairness in applying those findings in the Receiver's Action. Indeed, it is ludicrous to suggest that Brignoli's grievous misconduct as a fiduciary and the controlling person of BCR should be relitigated in the Receiver's Action.

Brignoli claimed in the District Court that the *Parklane* decision would not deny him of his right to a jury trial on the issue of damages. However, the right to jury trial can exist only with respect to disputed issues of fact. *Rosen v. Dick*, 639 F.2d 82, 94 (2d Cir. 1980); *Shore v. Parklane Hosiery Company, Inc.*, 565 F.2d 815, 819 (2d Cir. 1977), *aff'd*, 439 U.S. 322 (1979). Here, there were no disputed issues of fact. The amount of compensation paid to Brignoli in the period of his disloyalty and the amount of legal fees and costs charged to BCR in the *Curley* Action were not disputed and judgment was entered accordingly.

CONCLUSION

For the reasons stated above, respondent respectfully requests that the Court deny the petition in all respects.

Dated: New York, New York
March 13, 1992

Respectfully submitted,

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